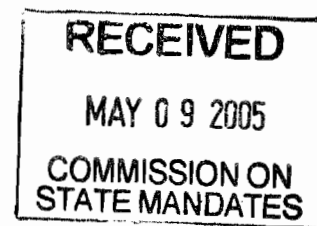




May 6, 2005

Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814



Dear Ms. Higashi:

This letter provides our comments to the commission's draft analysis on the state-mandated local costs of the Standardized Testing and Reporting (STAR) program (Case 04-RL-9723-01). Pursuant to a recommendation the Legislative Analyst's Office made in a 2003 report entitled *New Mandates: Analysis of Measures Requiring Reimbursement*, the Legislature requested the commission to reconsider its decision on the STAR mandate.

Three of the key findings in the draft analysis are:

- The STAR program is not a federal mandate and, therefore, is a state mandate on school districts.
- Federal funds provided under the No Child Left Behind (NCLB) Act cannot be counted as offsetting revenues to district costs.
- Any change in the commission's findings on the STAR mandate would affect district claims prospectively.

We offer our perspectives on these issues below.

Is NCLB a Federal Mandate?

The commission's draft analysis (please see page 23) cites the *Hayes* decision that the Constitutional requirement for mandate reimbursement "is to prevent the state from shifting the cost of government from itself to local agencies." It is important to establish from the onset, therefore, what the federal law requires of states and school districts in the area of assessment.

In the case of STAR and NCLB, the state is actually implementing specific requirements of the federal law. The NCLB requires *states* to establish a single statewide assessment and accountability system for all public school students—regardless of whether the students, schools, or districts participate in the federal program [Section 1111(b)(2)(A)]. Section 1111(b)(2)(A)(i) requires that each state accountability system "be

Legislative Analyst's Office
California Legislature
Elizabeth G. Hill • Legislative Analyst
925 L Street, Suite 1000 • Sacramento CA 95814
(916) 445-4656 • FAX 324-1281

Ms. Paula Higashi

2

May 6, 2005

based on academic standards and academic assessments...[that] take into account the achievement of all public elementary school and secondary school students." Section 1111(b)(2)(B) reinforces that point, requiring that adequate progress under the accountability system be "based on the [required] academic assessments" and include all schools and local education agencies. Under Section 1111(b)(3)(A), the act requires *states* to implement annual academic assessments in English, mathematics, and science. Section 1111(b)(3)(C)(i) directs states to ensure the assessments are "used to measure the achievement of all children." Thus, the federal law is clear that the state must create an assessment and accountability system that includes all students, schools, and public education agencies. The state, however, cannot realistically test all individual K-12 students. Though never directly stated, the testing of students falls to schools and districts.

With that as background, we turn to the commission's assessment of whether NCLB was a federal mandate. In *City of Sacramento*, the State Supreme Court identified a variety of factors that could be used to determine whether a federal law constitutes a federal mandate. Below, we discuss the draft staff analysis of these factors.

Nature and Purpose. The draft analysis finds that STAR and NCLB have sufficiently similar goals—improving teaching and learning—and that the nature and purpose of the two programs are reasonably similar. The analysis, however, also concludes that it is unclear "whether STAR was enacted as California's answer to NCLB." It is our understanding that the answer to that question is irrelevant. Federal law requires states to create assessments. If STAR had not existed in 2002, the Legislature would have had to pass legislation to authorize the creation of similar tests. Moreover, state law (Government Code Section 17513) clearly specifies that the federal mandate could be enacted *before or after* the state law that satisfies the mandate.

Intent to Coerce. Based on language in NCLB, the draft analysis concludes that the federal act is not intended to "mandate, direct, or control a state or local education agency...." We do not think this conclusion is supported by evidence cited in the analysis. The federal act does require assessment and accountability programs in all states. We have cited the specific requirements above. In addition, the staff analysis references from the NCLB do not seem pertinent to this point. Page 25 of the analysis cites the following passage from NCLB as support for its conclusions:

Nothing in this chapter shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction.

Ms. Paula Higashi

3

May 6, 2005

In our view, this statement expresses the federal government's intent that the act is not intended to dictate *specific* state policies on education, educational assessment, or curriculum. The language has no relevance to the issue of whether the federal law requires states to develop assessment programs. We think the federal law clearly requires states to establish assessment and accountability systems.

The draft analysis also cites federal intent language which states that NCLB does not "mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this chapter." While the staff analysis uses this quote to assert that NCLB has small penalties for not complying with the act's mandates, we read the statement as the federal government's intent to pay for both the state and local costs of its mandates.

The problem is that the act does not anticipate laws such as California's constitutional mandate reimbursement requirement, and therefore, does not clearly identify the level of government (state or district) responsible for bearing the programmatic costs. The federal law, however, provides other hints about its intent. Under Title VI of the act (Section 6111), California receives about \$31 million for "state assessments and related activities" (Web site, US Department of Education, Funds for State Formula-Allocated and Selected Student Aid Programs for California, 2004). The title enumerates nine allowable activities for these funds—revolving primarily around the need to develop state assessments as required under Section 1111(b). Title VI does not include reimbursing districts for their assessment-related costs as an allowable activity.

By implication, therefore, the act assumes districts will absorb the local costs of assessments with a portion of the federal funds provided to districts. The language of the act declares that all state and local mandates in NCLB are funded. By adding specific funding for state test development costs, it further suggests that local costs are covered as part of the local grants. Thus, we believe that the act (1) requires *state-developed* assessment and accountability systems—that is, the state had no choice about the mandate, and (2) effectively requires districts to test all students as a condition of funding.

When Participation Began. The draft analysis indicates the state began participation in the federal program in 1994—with the federal Improving America's Schools Act (IASA). Actually, the state has participated in the federal Elementary and Secondary Education Act (ESEA) for more than 30 years. The IASA and NCLB are simply new versions of the ESEA (which is reauthorized about every five years).

The state's long-term participation in the program is important because the federal programs authorized under ESEA have become part of the K-12 education landscape—and part of local budgets of schools and districts. The NCLB and its predecessors have

Ms. Paula Higashi

4

May 6, 2005

provided significant funding to school districts for service to improve the performance of low-income and other students. In 2004-05, for instance, NCLB provided \$1.8 billion to school districts for the main program in the act, known as "Title I" (2005-06 Governor's Budget, Reconciliation With Appropriations, Item 6110-101-0890, page EDU 26). Los Angeles Unified School District received more than \$360 million of these funds.

As the program is reauthorized, federal requirements have changed. The IASA introduced test-based accountability into the program. The NCLB extended the accountability provisions. As a result, we suggest the assessment and accountability requirements in the federal law should be viewed as an outgrowth of the program's history—and that STAR represents a requirement that states must satisfy in order to ensure that federal funding to districts continues to flow.

Penalties for Noncompliance. The commission's analysis cites the Supreme Court's determination in *City of Sacramento* that federal law that gives states no "realistic discretion" to refuse a federal incentive constitutes a federal mandate. The analysis concludes that the penalty contained in NCLB—loss of state administrative funds—does not reach the level of "certain and severe" required by the court.

This conclusion discounts information cited in the analysis that the federal government has threatened states with loss of their federal funds for failure to implement the assessment and accountability provisions of NCLB. The analysis concludes that it is "speculative whether the US Department of Education would actually withhold the funds, and if so, whether a court would uphold its decision."

We do not believe this is a reasonable criterion for evaluating whether state compliance was actually required. As the analysis indicates, the federal program adopts a "carrot and stick" approach to achieving federal education goals—that is, states and districts that want the federal funds must comply with the federal requirements. It seems unreasonable to expect the state to refuse to implement every federal program requirement that appears to create a local mandate until the state is forced to do so. Indeed, this interpretation would seem to suggest that state implementation decisions regarding virtually every federal program could constitute a state-mandated local program.

We believe the key issue is whether the state had real discretion in determining whether or not to impose state assessments as part of NCLB. Given the amount of funds at stake for school districts, we think the answer is "no." Could the state have implemented NCLB without creating assessment costs for districts? Again, we think the answer is "no."

Ms. Paula Iligashi

5

May 6, 2005

Other Factors. The commission's analysis discusses at length the fact that the requirements of STAR exceed those contained in IASA or NCLB. It uses this fact as evidence that the state *freely chose* to enact the STAR program, and therefore, the entire program constitutes a state-mandated local program. We do not understand why the fact that STAR exceeds the requirements of NCLB means that those parts of the program that satisfy the federal act should not be considered federally mandated. We do not argue that the entire STAR program should be considered a federal mandate—only those parts of the state program that can be reasonably construed to implement the federal requirements.

The staff analysis suggests that by exceeding the federal mandate, the state exercised true choice to impose implementation costs on local governments. This conclusion, however, does not appear to be consistent with *Hayes*. In that decision, the court stated:

Nothing...would suggest that the state is free to *shift state costs* to local agencies without subvention....In our view, the determination whether certain costs were imposed upon a local agency by a federal mandate must focus upon the local agency which is ultimately forced to bear the costs and how those costs came to be imposed upon that agency. If the state *freely chose* to impose the costs upon the local agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate....[emphasis added]

The plain language of the court decision shows that *freely chose* refers to the state's decision to shift costs imposed on states to local government. Does the STAR program shift the federal NCLB testing mandate from the state to school districts? As we discussed above, it would be unreasonable to expect the state to test all K-12 students each year in the manner required by federal law. In addition, NCLB implicitly assumes that states pay for the development of the mandated assessments and districts bear the costs of administering the test to students. Did the state make some choices in implementing the federal requirements? Yes, and to the extent these choices created costs for districts that exceed the minimum needed to implement the federal law, the state should pay for those costs.

The state, however, is not shifting its own costs to local government; it is implementing the federal law. That law requires states to develop assessment and accountability systems. In implementing the NCLB testing requirements, the state had no reasonable alternative to requiring districts to test students. The federal law also implicitly requires districts to test students. If STAR had not existed when the federal government enacted NCLB, the state would have had to create new tests similar to STAR. Simply because the test existed at the time the federal legislation was approved is not a reason for finding that those parts of NCLB that STAR satisfies are state

Ms. Paula Higashi

6

May 6, 2005

mandated. The fact that STAR exceeds the specific federal mandates also should not be a barrier to finding that STAR satisfies those federal mandates.

Offsetting Revenues

As we discussed above, federal law anticipates that districts are reimbursed through NCLB for the costs of testing students. Thus, another reasonable interpretation of the constitutional mandate reimbursement requirement is that the federal funds should be considered "offsetting revenues" that should be used to pay for the mandated costs. The staff analysis states that "in the absence of legislative direction [that districts use Title I funds to offset STAR costs], school districts have discretion in how to spend appropriated funds and are not required to spend it on the mandated exams...."

This conclusion appears to conflict with the Supreme Court's decision in the *School Site* case. In that decision, the court denied a finding of a state mandate for a program that may have legally compelled districts and schools to do certain things because sufficient funding was provided to pay for those activities. Specifically, the court did not find that a mandated local program had been created because "the state, in providing program funds to claimants, already has provided funds that may be used to cover the necessary notice and agenda related expenses."

The court made this determination on the basis that state law allowed districts to use a portion of program funds for administrative expenses. There was no specific state authorization—simply a general authorization that available funds *could be used* to pay for the required activities.

We think the STAR program requirements are a reasonable parallel to the *Site Council* case. The federal law states that it has funded all state and local costs of the program—implicitly including districts' assessment costs. As we discussed above, school districts in California received \$1.8 billion in federal Title I funds in 2004-05—clearly a sufficient amount to pay for the local costs of testing.

For this reason, if the commission does not find that the STAR program satisfied a federal mandate created by NCLB, we believe it would be appropriate to require districts to use federal funds to offset those costs that are required by the federal program. This would result in essentially the same outcome for districts as determining the NCLB testing requirements to be a federal mandate.

Effective Date of the Commission's Reconsideration

The analysis concludes that any changes in the draft analysis on the STAR mandate would affect district claims prospectively. It bases this determination on the State Supreme Court's decisions on the general applicability of legislation. The analysis,

Ms. Paula Higashi

7

May 6, 2005

however, does not consider the history of the STAR mandate and the Legislature's role in reviewing the commission's findings in its determination on this issue.

Generally, the mandate process occurs in several stages. First, local governments submit claims for reimbursement for new mandates to the commission. That initiates the commission's review, which produces a Statement of Decision, Parameters and Guidelines, and a statewide cost estimate for mandated activities. Upon completion of that process, an appropriation for funding is submitted through legislation to the Legislature based on the commission's statewide cost estimate.

The Legislature's review provides an opportunity to review the commission's findings, make changes to the enabling legislation to reduce costs, or request additional analysis by the commission. Mandates that are funded through this process are recognized as "approved" and state funding for the mandate is normally included in future budget acts.

As part of that review, the Legislature directed our office to annually evaluate newly completed mandate claims. In 2003, our review culminated in the report, *New Mandates: Analysis of Measures Requiring Reimbursement*, which included our recommendations that the Legislature (1) not approve the commission's STAR decision, and (2) request the commission to review its decision based on specific information.

By approving that recommendation, the Legislature intended the commission to revisit its original decision. In so doing, the Legislature signaled that it has not formally approved the commission's past work on the STAR mandates and, therefore, does not recognize the validity of the Parameters and Guidelines developed for the mandate. For that reason, we believe the Legislature intended that any changes to the commission's previous findings on the STAR mandate should affect past and future district claims on the mandate.

We appreciate the opportunity to offer our programmatic perspectives on these matters. Please call me at 319-8307 if you have any questions or comments.

Sincerely,

Paul Warren
Principal Fiscal and Policy Analyst